Petition

81-236

No. _____

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of the United States

October Term, 1981

GRINDSTONE BUTTE PROJECT, A Tenancy in Common, et al.,

Petitioners,

-vs-

JAMES G. WATT, Secretary of the Interior, et al.,

Respondents.

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William F. Ringert
P.O. Box 2773
Boise, Idaho 83701
(208) 342-4591
Attorney for Petitioners

No. _____

In The Supreme Court of the United States

October Term, 1981

GRINDSTONE BUTTE PROJECT, A Tenancy in Common, et al.,

Petitioners,

-vs-

JAMES G. WATT, Secretary of the Interior, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William F. Ringert
P.O. Box 2773
Boise, Idaho 83701
(208) 342-4591
Attorney for Petitioners

The Petitioners, Grindstone Butte Project, a tenancy in common, et al., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on January 30, 1981, and to review the order entered by the Court of Appeals on July 13, 1981.

QUESTIONS PRESENTED

1. Whether the Court of Appeals had subject matter jurisdiction to apply 43 U.S.C. § 959 (the 1901 Act) and 42 U.S.C. §§ 4331 (b) and 4332 (NEPA) to irrigation rights of way acquired by the Petitioners under 43 U.S.C. §§ 946-949 (the 1891 Act), where neither the Petitioners, in their maps and applications, nor the Secretary of the Interior, in his decisions, invoked or applied the 1901 Act or NEPA, and the Complaint raised no issue under the 1901 Act or under NEPA?

2. Whether the Court of Appeals committed error in upholding the Secretary's action by applying the 1901 Act and NEPA, when the Secretary based his action entirely on the 1891 Act and the applicable regulation required that rights of way for the main purpose of irrigation be applied for under the 1891 Act?

3. Whether the 1901 Act and NEPA authorize the Secretary to impose conditions on irrigation rights of way granted by the 1891 Act.[1]

---

[1] The parties to the proceedings in the Court of Appeals were Grindstone Butte Project, a tenancy in common, comprised of

TABLE OF CONTENTS

Page

Questions Presented 1
Table of Contents 2
Table of Authorities 4

Jim Bean and Marianne Bean, husband and wife, Boyd Chugg and Gerry Chugg, husband and wife, Richard E. Elliott and Alice M. Elliott, husband and wife, Farm Development Corporation, and Idaho corporation, Aubrey F. Gray and Marjorie A. Gray, husband and wife, Elden E. Gray and Joyce J. Gray, husband and wife, Lawerance V. Gray and Mary Lou Gray, husband and wife, Hammett Livestock Company, an Idaho corporation, James R. Kent and Betty Lou Kent, husband and wife, Gilbert Kent and Wanda Lee Kent, husband and wife, H. Allen Kiester and Patricia Kiester, husband and wife, John Kinghorn and Myrtice J. Kinghorn, husband and wife, Roy Land and Ardith Land, husband and wife, Beverly E. Morris, individually and as surviving spouse of, and personal representative of the estate of Robert E. Morris, deceased, Allen T. Noble and Billie Dee Noble, husband and wife, Darwin Pancheri and Joan Pancheri, husband and wife, Fred Ringert and Elizabeth Ringert, husband and wife, Gary Ringert, William F. Ringert and Lynne K. Ringert, husband and wife, Thomas Rudy and Arlene J. Rudy, husband and wife, Dwayne Skogsberg and Ida Laurene Skogsberg, husband and wife, Glenn Skogsberg and Sharon Skogsberg, husband and wife, Louis Solosabal and Ruth Solosabal, husband and wife, Frank S. Galey, Jr., and Gwendolyn Galey, his wife, Richard W. Stiehl and Betty Stiehl, husband and wife, John R. Solosabal and Eva A. Solosabal, husband and wife, Roger Leon Stimpson and Sandra C. Stimpson, husband and wife, Richard Stimpson and Jeanne Stimpson, husband and wife, and Eldon J. Yorgason, Plaintiffs, and Thomas S. Kleppe, Secretary of the Interior, Curt Berklund, Director of the Bureau of Land Management, Vincent S. Strobel, Chief, Branch of L & M Operations of the Idaho State Office of the Bureau of Land Management and Lorin J. Welker, Chief, Division of Technical Services of the Idaho State Office of the Bureau of Land Management, Defendants.

Opinions Below 7
Jurisdiction 7
Constitutional Provision, Statutes and Regulations Which The Case Involves 7
Statement of the Case 13
Argument 15
1. The Court of Appeals exceeded its jurisdiction 16
2. The Court of Appeals improperly upheld the Secretary's action on grounds other than those on which the Secretary based his decisions ... 18
3 The Court of Appeals erroneously disregarded the plain language of the statutes, the applicable legislative history and contemporaneous administrative practice, and the binding regulation issued by the Secretary 18
Conclusion 24
Appendix 1a
Opinion of the Court of Appeals 1a
Order of the Court of Appeals (denying motion to recall mandate and for other relief) 10a
Opinion of the District Court 11a
Judgment of the District Court 22a
Opinion of Interior Board of Land Appeals (First Appeal) 24a
Opinion of Interior Board of Land Appeals (Second Appeal) 38a
Decision of Bureau of Land Management, Right of Way No. I-7365 ..... 43a
Decision of Bureau of Land Management, Right of Way No. I-7366 ..... 45a

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 81 L. Ed. 617, 57 S. Ct. 461 (1937)	17
American Textile Manufacturers Institute, Inc. v. Donovan, 49 U.S.L.W. 4720 (U.S. June 17, 1981)	18
Andrus v. Shell Oil Co., 446 U.S. 657, 64 L. Ed. 2d 593, 100 S. Ct. 1932 (1980)	19
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1936)	17
Batterton v. Francis, 432 U.S. 416, 53 L. Ed. 2d 448, 97 S. Ct. 239 (1977)	21
Bosco, Francis W., 39 Land Dec. 104 (1910)	22
Burke v. Southern Pacific R. Co., 234 U.S. 669, 58 L. Ed. 1527, 34 S. Ct. 907 (1914)	19
FCC v. Pacifica Foundation, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)	16
Fedorenko v. United States, 49 U.S.L.W. 4120 (U.S. Jan. 21, 1981)	19
Flast v. Cohen, 392 U.S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968)	17
Gully v. First National Bank, 299 U.S. 109, 81 L. Ed. 70, 57 S. Ct. 96 (1936)	17
Heald v. District of Columbia, 254, U.S. 20, 65 L. Ed. 106, 41 S. Ct. 42 (1920)	23
Hodel v. Virginia Surface Mining and Recl. Assoc., Inc., 49 U.S.L.W. 4654 (U.S. June 15, 1981)	17

Immigration and Naturalization Service v. Wang, 49 U.S.L.W. 3640 (U.S. April 27, 1981) 23

Kern River Company v. United States, 257 U.S. 147, 66 L. Ed. 175, 42 S. Ct. 60 (1921) 23

Morton v. Mancari, 417 U.S. 535, 41 L. Ed. 290, 94 S. Ct. 2474 (1974) 23, 24

N.L.R.B. v. Pipefitters, 429 U.S. 507, 51 L. Ed. 2d 1, 97 S. Ct. 891 (1977) 18

Phillips Petroleum Company v. Texaco, 415 U.S. 125, 39 L. Ed. 2d 209, 94 S. Ct. 1022 (1974) .. 17

Santa Fe P. R. Co. v. Lane, 244 U.S. 492, 61 L. Ed. 1275, 37 S. Ct. 714 (1917) 23

St. Martin Lutheran Church v. South Dakota, 49 U.S.L.W. 4575 (U.S. May 26, 1981) 24

Stafford v. Briggs, 444 U.S. 527, 63 L. Ed. 2d 1, 100 S. Ct. 774 (1980) 19

Train v. Colorado Public Interest Research Group, 426 U.S. 1, 48 L. Ed. 2d 434, 96 S. Ct. 1938 (1976). 19

Watt v. Alaska, 49 U.S.L.W. 4433 (U.S. April 21, 1981) 19, 23, 24

CONSTITUTION

United States Constitution, Article III, Section 2 ..... 7, 17

STATUTES

28 U.S.C. § 1254(1) 7
28 U.S.C. § 1331 15
28 U.S.C. § 1361 15

42 U.S.C. § 4331(b) 1, 12
42 U.S.C. § 4332 ..... 1, 12
43 U.S.C. § 946 ..... 1, 8, 20
43 U.S.C. § 947 ..... 1, 9
43 U.S.C. § 948 ..... 1, 9
43 U.S.C. § 949 ..... 1, 10
43 U.S.C. § 959 ..... 1, 11

REGULATIONS AND INSTRUCTIONS

Opinion, 28 Land Dec. 474 (1899) 20
Regulations, 31 Land Dec. 13 (1901) 21, 22
43 C.F.R. § 2873.1(b) (1973) 13, 22

OTHER

33 Cong. Rec. 4559-4560 (1900) 20
54 Cong. Rec. 3108 (1917) 21
H.R. 11973, 56th Cong., 1st Sess. (1900) 20
H.R. Report No. 993, 56th Cong., 1st Sess. (1900) 20
H.R. Report No. 1850, 56th Cong., 1st Sess. (1900) 20

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 638 F. 2d 100, and appears in the Appendix at 1a -9a. The opinion and judgment of the United States District Court for the District of Idaho are unreported, and appear in the Appendix at lla - 23a. The opinions of the Interior Board of Land Appeals are reported at 18 IBLA 16 and 24 IBLA 49, and appear in the Appendix at 24a - 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 30, 1981, and a timely petition for rehearing and suggestion for rehearing en banc was denied on April 9, 1981. An extension to August 6, 1981 for filing this petition for a writ of centiorari was granted by Justice Rehnquist on June 18, 1981. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

Article III, Section 2 of the Constitution of the United States provides in pertinent part:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

their Authority; . . ."

Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946, provides as follows:

> "The right of way through the public lands and reservations of the United States is granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and

the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Section 19 of the Act of March 3, 1891, 26 Stat. 1102, 43 U.S.C. § 947, provides as follows:

"Any canal or ditch company desiring to secure the benefits of sections 946 to 949 of this title shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Section 20 of the Act of March 3, 1891, 26 Stat. 1102, 43 U.S.C. § 948, provides in pertinent part as follows:

"The provisions of sections 946 to 949 of this title shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps therein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the officer, as the Secretary of the Interior may designate, of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. . . . *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

Section 21 of the Act of March 3, 1891, 26 Stat. 1102, 43 U.S.C. § 949, provides as follows:

"Nothing in sections 946 to 949 of this title shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."

The Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959, provides in pertinent part as follows:

"The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the Untied States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such per-

mits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: . . . *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

Title I, Section 101 of the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4331(b) provides in pertinent part as follows:

"(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources . . ."

Title I, Section 102 of the National Environmental Policy Act, 83 Stat. 853, 42 U.S.C. § 4332, provides in pertinent part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, . . ."

The regulation, 43 C.F.R. § 2873.1(b) provides as follows:

"§ 2873.1 Procedures.

. . .

(b) *Applications which may be submitted under the acts of February 15, 1901, and March 4, 1911.* (1) All applications where it is sought to acquire a right-of-way for the main purpose of irrigation, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. 946-949), and section 2 of the act of May 11, 1898 (30 Stat. 404; 43 U.S.C. 951), must be submitted under the 1891 and 1898 acts, in accordance with the applicable regulations in this part."

STATEMENT OF THE CASE

In 1973 the Petitioners filed maps and applications for irrigation rights of way granted by the Act of March 3, 1891, as amended[2] (the 1891 Act), in the Idaho State Office of the Bureau of Land Management (BLM), of the United States Department of the Interior. In 1974, at about the same time construction of the irrigation system was completed, the BLM issued decisions approving the maps and purporting to "grant" the rights of way. App., 43a - 46a. Each decision imposed several conditions on

---

[2] Act of March 3, 1891, c. 561, §§ 18-21, 26 Stat. 1101-1102; Act of March 4, 1917, c. 184, § 1, 39 Stat. 1197; Act of May 28, 1926, c. 409, 44 Stat. 668. 43 U.S.C. §§ 946-949, repealed by Act of October 21, 1976, P.L. 94-579, Title VII, Sec. 706 (a), 90 Stat. 2793.

the applicable right of way. App., 44a and 46a. Right of way No. 7365 contained a condition that "any violation of these stipulations will result in cancellation of the right-of-way grant . . . ." App., 34a. Petitioners appealed to the Interior Board of Land Appeals (IBLA), contending that the BLM had no authority to impose the conditions on irrigation rights of way and that the conditions were unreasonable. The IBLA held that the 1891 Act authorized the BLM to impose the conditions, but remanded the case to the BLM for consideration of Petitioners' objections to the reasonableness of the conditions.[3] The BLM rejected most of the Petitioners' objections, and the IBLA affirmed that rejection on the second appeal.[4]

After the BLM had filed an administrative contest seeking cancellation of Right of Way No. I-7365 for unspecified violations of the conditions, Petitioners filed an action against the Secretary of the Interior (Secretary) and subordinate officials, in the United States District Court for the District of Idaho, seeking a declaratory judgment that the BLM did not have authority to impose the challenged conditions or to cancel the rights of way by administrative proceedings. Because the Petitioners' rights depended upon the interpretation of federal statutes and because the Petitioners sought to compel the Secretary to perform a ministerial duty, the District

---

[3] 18 IBLA 16 (1974), App., 24a - 37a.

[4] 24 IBLA 49 (1976), App., 38a - 42a.

Court had jurisdiction under 28 U.S.C. §§ 1331 and 1361.

The District Court held that title to the rights of way vested when the maps were approved and could not be cancelled through administrative proceedings, and that the challenged conditions were void because the Secretary and the Department of the Interior lacked authority to impose them. App., 20a, 23a.

On appeal by the Secretary, the United States Court of Appeals for the Ninth Circuit reversed, holding that, while the Petitioners were entitled to irrigation rights of way under the 1891 Act, the Secretary was authorized by the 1901 Act to "condition the grant of rights-of-way over federal lands upon compliance with reasonable regulations and terms designed to protect the public interests." App., 7a; 638 F. 2d 100, 103 (1981). Petitioners' petition for rehearing was denied. Petitioners' motion to recall the mandate, and vacate the judgment for want of subject matter jurisdiction, and affirm the judgment of the District Court, was denied by the Court of Appeals. App., 10a.

ARGUMENT

The question of whether the Court of Appeals has subject matter jurisdiction to uphold the Secretary's action by applying statutes that neither the Petitioners nor the Secretary invoked or relied on in the administrative proceedings is an important question regarding the extent of the judicial power, that

should be decided by this Court. Irrigation is the life blood of large areas in the arid western states, and the rights of way for the irrigation systems are essential to their continuing operation. If the Court of Appeals had jurisdiction, the question of whether the 1901 Act applies to rights of way for the main purpose of irrigation is extremely important because of its effects on the hundreds of rights of way granted by the 1891 Act, whether located on public lands or on lands that have passed into private ownership subject to rights of way created when the lands were public. For that reason, and because compliance with unauthorized conditions imposes an unwarranted financial burden on irrigators, and enforcement of such conditions results in unnecessary expenditures of federal funds, that question should be decided by this Court.

Consideration by this Court is necessary on the independent grounds that the holding of the Court of Appeals is not based on the grounds on which the Secretary acted and is contrary to controlling decisions of this Court.

1. *The Court of Appeals exceeded its jurisdiction.*

The jurisdiction of the courts below was limited to the action taken by the BLM when it issued the right of way decisions,[5] and to the federal question disclosed upon the face of the Petitioners' com-

---

[5] *See, FCC v. Pacifica Foundation*, 438 U.S. 726, 734-735 (1978).

plaint, unaided by the answer.[8] The BLM did not rely upon, or apply, or act under, the 1901 Act or NEPA in issuing the right of way decisions, and the decisions did not give rise to a justiciable controversy as to the applicability and interpretation of the 1901 Act or NEPA. Nothing in the decisions constituted an actual or threatened interference, under the 1901 Act or NEPA, with the rights of the Petitioners, and the Secretary is in no position to claim that his decisions interfere with the rights of the United States. The judicial power does not extend to the determination of abstract questions of applicability and interpretation of the 1901 Act or NEPA. *Cf., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324, (1936); *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). The Petitioners' complaint not having presented any question regarding the 1901 Act or NEPA and there being no justiciable controversy between the parties regarding those Acts, the court below exceeded its jurisdiction when it held that the 1901 Act or NEPA empowered the Secretary to impose conditions on the rights of way obtained by the Petitioners under the 1891 Act, in violation of Article III, Section 2 of the Constitution of the United States. *Cf., Hodel v. Virginia Surface Mining and Recl. Assoc., Inc.*, 49 U.S.L.W. 4654, 4664 (U.S. June 15, 1981); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-242 (1937).

---

[8] *See, Gully v. First National Bank*, 299 U.S. 109, 112 (1936); *Phillips Petroleum Company. v. Texaco*, 415 U.S. 125, 127-128 (1974).

2. The Court of Appeals improperly upheld the Secretary's action on grounds other than those on which the Secretary based his decisions.

The decision below is in direct conflict with the decisions of this Court uniformly holding that an administrative order can not be upheld unless the grounds upon which the agency acted in exercising its powers are those upon which its action can be sustained. See, e.g., *American Textile Manufacturers Institute, Inc. v. Donovan*, 49 U.S.L.W. 4720, 4733 (U.S. June 17, 1981); *N.L.R.B. v. Pipefitters*, 429 U.S. 507, 522, n. 9 (1977). The BLM's action was taken entirely under the 1891 Act, with no reference to the 1901 Act or to NEPA, and the validity of the action must be measured against the terms of the 1891 Act. *Cf., American Textile Manufacturers*, supra. The decision of the court below recognizes that the 1891 Act does not authorize the challenged conditions, and relies entirely on the 1901 Act as the substantive authority for imposing the conditions, and relies on NEPA for the reasonableness of the conditions, thus improperly substituting the court's judgment for that of the Secretary.

3. The Court of Appeals erroneously disregarded the plain language of the statutes, the applicable legislative history and contemporaneous administrative practice, and the binding regulation issued by the Secretary.

The decision below is contrary to the intent of Congress and is in direct conflict with the decisions of this Court holding that in the interpretation of

statutes the courts must determine the intent of Congress,[7] and that, where the meaning is not plain from the words of the statute, legislative history and contemporaneous administrative construction and practice must be considered.[8] The decision below also is in direct conflict with the decisions of this Court holding that the Secretary does not have power to impose conditions or terms on congressional grants of real property, *see, e.g., Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 696-709 (1914), and cases there cited and analyzed, and with those holding that the courts are not at liberty to imply a condition which is opposed to the explicit terms of a statute, *see, e.g., Fedorenko v. United States*, 49 U.S.L.W. 4120, 4126 (U.S. Jan. 21, 1981).

The 1891 Act is a plain and unequivocal grant *in praesenti* of a virtually unconditional right of way. The language of the 1901 Act does not expressly, or even impliedly, refer to the 1891 Act and does not purport to authorize the Secretary of the Interior to impose conditions on rights of way acquired under the 1891 Act. If Congress intended the 1901 Act to apply to rights of way acquired under the 1891 Act, that intent must be found outside the language of the statute.

---

[7] *See, e.g., Watt v. Alaska*, 49 U.S.L.W. 4433, 4434-4435 (U.S. April 21, 1981); *Stafford v. Briggs*, 444 U.S. 527, 535-536 (1980.

[8] *See, e.g., Stafford v. Briggs*, supra; *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976); *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980).

The necessity for the 1901 Act arose from an opinion issued in 1899 by Assistant Attorney-General Van Dervanter (later a justice of this Court), in which he advised Representative DeVries of California that the 1891 Act did not authorize the Secretary to grant rights of way for reservoirs or ditches in Yosemite National Park or any forest reserve within California, for the purposes of mining or for domestic purposes. 28 Land Dec. 474 (1899). Thus the problem presented to Congress was not one of restricting irrigation rights of way, but one of providing rights of way for power generation and other uses where irrigation was not the main purpose.[9] Mr. DeVries' attempt to amend the 1891 Act by extending its provisions to rights of way for primary uses other than irrigation was unsuccessful. See 33 Cong. Rec. 4559-4560 (1900). That led to his introduction of H.R. 11973, which became the 1901 Act. The committee report on H.R. 11973 was quick to point out that "this bill *allows permits* for the rights of way set forth in the bill while the former bill *made grants in fee* of those rights."[10] (Emphasis supplied.)

Debate on the 1917 amendment to 43 U.S.C. § 946 included the following statement regarding irrigation rights of way:

---

[9] See H.R. Report No. 993, Fifty-Sixth Congress, First Session (1900).

[10] See H.R. Report No. 1850, p. 1, Fifty-Sixth Congress, First Session (1900).

> "There are no restrictions whatever upon them. No administrative officer is designated to pass on the question of the extent of the right of way or the circumstances or conditions under which it should be granted. . . ." 54 Cong. Rec. 3108 (64th Cong., 2d Sess., 1917).

The first regulations under the 1901 Act, issued in July of 1901, and published at 31 Land Dec. 13, et seq., stated that they were promulgated under the Acts of Congress approved February 15, 1901, January 21, 1895, and Section 1 of the Act of May 11, 1898, thereby establishing that the regulations were the "general regulations" to be fixed by the Secretary as expressly authorized by the 1901 Act. Thus, the regulations are legislative or substantive, and can not be set aside by a reviewing court simply because the court would have interpreted the statute in a different manner. *See, Batterton v. Francis,* 432 U.S. 416, 425 (1977). The regulation can be set aside only if the Secretary exceeded his statutory authority, or if the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id. None of these grounds were urged or applied in the court below.

The relevant portion of the 1901 regulation states:

> "Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the acts referred to, yet, considering the general scope and purpose of the act, the Congress having, with the exception above noted, embodied

> therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as the same pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation and for public or other purposes as subsidiary thereto, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the then existing regulations issued under said acts. . . ."[11]

By this regulation the Secretary precluded himself from applying the 1901 Act to rights of way for the main purpose of irrigation. In *Francis W. Bosco*, 39 Land Dec. 104 (1910) it was held that restrictions could not be imposed on irrigation rights of way sought under the 1891 Act. These interpretations were incorporated into the 1891 Act when Congress amended that Act in 1917 and in 1926,[12] without any change in the relevant portions of the statute.

---

[11] 31 Land Dec. at 14. The substance of this regulation was contained in the regulations in effect when the right of way decisions in this case were issued. See 43 C.F.R. 2873.1(b) (1973), at 13, supra.

[12] See note 2, supra.

Cf., Santa Fe P. R. Co. v Lane, 244 U.S. 492, 496 (1917). The applicability of this regulation was urged by Petitioners in the court below (Appellees' Br., 29-30). That court erred by not considering and applying the regulation, and by encroaching on the Secretary's authority to fix general regulations for administration of the 1901 Act. *Cf., Immigration and Naturalization Service v. Wang,* 49 U.S.L.W. 3640, 3641 (U.S. April 27, 1981).

As applied to irrigation rights of way, the 1901 Act, which expressly provides that any permission given under that Act may be revoked in the Secretary's discretion, and shall not confer any right, or easement, or interest in, to, or over any public land, is in direct conflict with this Court's holding that the grant intended by the 1891 Act is a limited fee, differing significantly from the permission provided by the 1901 Act, the latter being only a revocable permit or license. *Kern River Company v. United States,* 257 U.S. 147, 152 (1921).[13] This interpretation of § 946 was approved when Congress amended the 1891 Act in 1926, without any change in the relevant provisions. *Cf., Heald v. District of Columbia,* 254 U.S. 20, 22-23 (1920).

There being no indication of congressional intention to modify the specific provisions of the 1891 Act by applying to it the general provisions of the 1901 Act, it is the duty of the courts to regard both statutes as effective. *Watt v. Alaska,* supra, 49 U.S.L.W. at 4435; *Morton v. Mancari,* 417 U.S. 535,

[13] Justice Van Dervanter wrote the opinion in *Kern River Company.*

550-551 (1974). For nearly 80 years before the decision below, the 1891 Act was regarded as applicable where a limited fee was required for the main purpose of irrigation, and the 1901 Act was regarded as applicable where a permissive use for some main purpose other than irrigation was desired. Each statute is capable of operating independently of the other, and it was error for the court below to "harmonize" the statutes as it did, in the absence of a clear and manifest expression of congressional intent that the 1901 Act was to be a modification of the 1891 Act. *Watt v. Alaska*, supra; *Morton v. Mancari*, supra; *St. Martin Lutheran Church v. South Dakota*, 49 U.S.L.W. 4575, 4579 (U.S. May 26, 1981).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

William F. Ringert
P.O. Box 2773
Boise, Idaho 83701
Attorney for Petitioners

APPENDIX

GRINDSTONE BUTTE PROJECT, a tenancy in common, et al., Plaintiffs-Appellees,

v.

Thomas S. KLEPPE, Secretary of the Interior, et al., Defendants-Appellants.

No. 78-1134.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 8, 1980.

Decided Jan. 30, 1981.

On Appeal from the United States District Court for the District of Idaho.

Before SKELTON, Judge,* FARRIS and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

This is an appeal from a summary judgment holding that the Secretary of the Interior lacked authority to impose terms and conditions, primarily designed to protect the environment, upon irrigation rights of way granted over federal lands under the Act of March 3, 1891, 43 U.S.C. §§ 946-949 (1891 Act). We reverse.

FACTS

The pertinent facts are undisputed. In 1974, the Idaho Office of the Bureau of Land Management, United States Department of the Interior, granted two irrigation rights of way over federal lands to the Grindstone Butte Project (Grindstone), a tenancy in common comprised of several individuals and two corporations. Grant No. I 7365 was for a pump base site and a 48 inch irrigation pipeline. Grant No. I 7366 was for an irrigation canal and pipeline. These two rights of way, both limited to fifty years duration, were granted under the authority of the 1891 Act.

Grants No. I 7365 and I 7366 contain several terms and conditions requiring Grindstone, *inter alia*, to regulate the use of poisonous substances; minimize despoliation of public land by reseeding soil distrubed by construction; remove construction debris; prevent water, oil, and chemical pollution; protect fish by placing screens around pump intakes, and preserve archeological sites discovered during construction.

In 1974, the Interior Department's Board of Land Appeals (IBLA) rejected Grindstone's challenge to the Interior Secretary's authority to impose terms and conditions upon rights of way granted under the 1891 Act. IBLA remanded the matter to the Idaho Office of the Bureau of Land Management for consideration of Grindstone's objections to the reasonableness of the terms and conditions imposed on the grants. *Grindstone Butte Project*, 18 IBLA

16 (1974). In 1976, IBLA affirmed the Bureau of Land Management's determination that the contested terms and conditions were reasonable. *Grindstone Butte Project*, 24 IBLA 49 (1976).

On September 2, 1976. Grindstone filed this action in the United States District Court for the District of Idaho seeking, *inter alia*, a declaratory judgment that the Secretary of the Interior and certain Bureau of Land Management officials lacked authority to impose conditions other than those expressly stated in the 1891 Act, upon rights of way granted pursuant to that statute. On September 8, 1977, the district court granted Grindstone's motion for summary judgment on the ground that the Secretary of the Interior lacked authority to impose terms and conditions upon rights of way granted under the 1891 Act.[1] This appeal followed.

DISCUSSION

The question before this court is whether the Secretary of the Interior, to protect the public interest, has statutory authority to impose reasonable terms and conditions on grants issued under the 1891 Act for the construction and use of irrigation rights of way over federal lands.[2] This is a question of law subject to *de novo* review. *Phillips v. Amoco Trinidad Oil Co.*, 632 F .2d 82, 84 (9th Cir. 1980).

---

[1] The district court's opinion is unpublished. *Grindstone Butte Project et. al. v. Kleppe et. al.* Civ. No. I 76 173 (D. Idaho Aug. 9, 1977).

[2] This issue is important only insofar as it applies to rights of

We conclude that the Secretary does have statutory authority to impose reasonable conditions, necessary to protect the public interest, on irrigation rights-of-way granted over federal lands under the 1891 Act. Accordingly, we reverse the judgment of the district court.

Authority to Impose Terms and Conditions

The Secretary of the Interior requires grantees under the 1891 Act to abide by certain conditions designed to prevent injury to the environment and otherwise to protect adjacent lands and other interests of the United States. The Secretary asserts that authority to impose these conditions is derived from the 1891 Act itself. Additionally, the Secretary argues that the Act of February 15, 1901, 43 U.S.C. § 959 (1901 Act)[3] and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq.

way granted before October 21, 1976, because the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976 Act), specifically authorizes the terms and conditions at issue here. 43 U.S.C. § 1765. The 1976 Act which revised the laws concerning rights of way over federal lands, repealed the Acts of 1891 and 1901, and other right of way statutes. Because the 1976 Act expressly excludes from its coverage rights of way granted before October 21, 1976, the statutory interpretation urged by Grindstone, and adopted by the district court, could invalidate terms and conditions previously imposed by the Secretary of the Interior on all 1891 Act grants.

[3] The 1901 Act, like the 1891 Act, provides for grants of rights of way over federal lands. Unlike the 1891 Act, which is limited to irrigation or drainage rights of way, the 1901 Act provides for rights of way for a wide array of purposes, including irrigation, electrical transmission, mining and forestry.

(NEPA), demonstrate a continuing Congressional commitment to protect the public interest in federal lands and resources and constitute authority for imposing protective terms and conditions on rights of way granted under the 1891 Act.

In rejecting the Secretary's contentions, the district court stated: "It is clear from the statute, as well as from the cases under it, that the 1891 Act is a grant *in praesenti,*" i.e., a transfer of a present interest in land. See *Van Wyck v. Knevals,* 106 U.S. 360, 365, 1 S. Ct. 336, 337, 27 L.Ed. 201 (1882). The court accordingly held that because the 1891 Act granted the irrigation rights of way *in praesenti,* the Secretary lacked discretion to "award, withhold, or condition" such grants. The district court found, however, that the 1891 Act contained two explicit conditions that, once satisfied, prevent forfeiture of a right of way: (1) each section of the proposed canal or ditch must be completed within five years after the "location" of that section, 43 U.S.C. § 948, and (2) the main purpose of the right of way must be for irrigation or drainage. 43 U.S.C. § 946. The court held that the Secretary of the Interior exceeded statutory authority by imposing conditions beyond the two specified in the Act. The district court's memorandum opinion, filed on August 9, 1977, mentioned neither the 1901 Act nor NEPA, both of which were in effect when Grindstone applied for the two irrigation rights of way.

The Secretary of the Interior's authority to impose conditions on rights of way granted under the 1891 Act and to reject applications for failure to

comply with such conditions is implicitly recognized in *United States ex. rel. Sierra Land & Water Co. v. Ickes,* 84 F. 2d 228 (D.C.Cir), cert. denied, 299 U.S. 562, 57 S.Ct. 24, 81 L.Ed. 414 (1936). There the District of Columbia Circuit refused to issue a writ of mandamus to compel the Secretary of the Interior to approve applications for rights-of-way. The court spoke of the broad jurisdiction conferred upon the Secretary of the Interior to promulgate reasonable regulations concerning the disposition of public lands. 84 F. 2d at 230, 231. Moreover, the court rejected the contention, urged upon us by Grindstone, that section 18 of the 1891 Act, 43 U.S.C. § 946, granted rights of way *in praesenti.* 84 F. 2d at 231. In rejecting that contention, the court concluded that rights-of-way do not vest until the Secretary has, in accordance with reasonable regulations, approved the prospective grantee's application. *Id.*

1. 1901 Act

In contrast to the 1891 Act. the 1901 Act explicitly authorizes the Secretary of the Interior to grant and revoke rights-of-way pursuant to regulations adopted by the Department of the Interior. Because of this difference and because the subject matter of the 1891 Act falls within the ambit of the 1901 Act, the Secretary argues that the 1901 Act repealed the 1891 Act by implication.

Repeals by implication, however, are not favored and will only be found when "the new statute is clearly repugnant, in words or purpose, to the old

statute," and when Congressional intent to repeal is clear. *United States v. Georgia Pacific Co.*, 421 F .2d 92, 102 (9th Cir. 1970). Furthermore, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483 41 L.Ed.2d 290 (1974). Since the 1901 Act is not "clearly repugnant, in words or purpose," to the 1891 Act we regard both acts as effective and therefore will interpret them harmoniously.

Accordingly, we hold that, under the 1891 Act, any applicant who complied with the Act's requirements was entitled to an irrigation right of way; however, that entitlement was qualified by the 1901 Act authorizing the Secretary to condition the grant of rights of way over federal lands upon compliance with reasonable regulations and terms designed to protect the public interest.

In *Hyrup v. Kleppe*, 406 F. Supp. 214 (D. Col. 1976), aff'd, Nos. 76-1452, 76-1767 (10th Cir. Nov. 7, 1977), the district court resolved an analogous problem of statutory interpretation involving the interrelationship between two statutes by harmonizing the Act of 1866. 43 U.S.C. § 661 (1866 Act), and the 1901 Act. Mr. Hyrup applied for an irrigation right of way under the 1866 Act, which is essentially similar to the 1891 Act. The court found it unnecessary to reach the question whether the 1866

Act had been repealed by the 1901 Act. Instead, the court fulfilled what it regarded as its "plain duty" by reading the 1866 and 1901 Acts harmoniously. 401 F. Supp. at 217. The court concluded that the 1866 Act gave Mr. Hyrup a right to use public lands for a pipeline subject to regulations promulgated under the 1901 Act.

2. NEPA

The Secretary cites NEPA as additional authority for imposing conditions on grants of irrigation rights of way. NEPA made environmental protection part of the mandate of every federal agency. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F .2d 1109, 1112 (D.C.Cir. 1971). Under NEPA, federal agencies have "the continuing responsibility ... to use all practicable means, consistent with other essential considerations of national policy, (to protect the environment)." 42 U.S.C. § 4331(b). Congress further mandated that, to the fullest extent possible, policies, regulations, and public laws of the United States "shall be interpreted and administered in accordance with the policies set forth" in NEPA. 42 U.S.C. § 4332.

Thus, the Secretary of the Interior is not only permitted but required to take environmental values into account in carrying out regulatory functions, *see Detroit Edison Co. v. Nuclear Regulatory Commission*, 630 F.2d 450 (6th Cir. 1980), unless there is a clear and unavoidable conflict of statutory authority prohibiting the Secretary from complying with

NEPA's mandate. *Flint Ridge Development Co. v. Scenic Rivers Ass'n.* 426 U.S. 776, 787, 788, 96 S. Ct. 2430, 2437, 2438, 49 L. Ed. 2d 205 (1976). Because we hold that the Secretary is vested with statutory authority to impose reasonable terms and conditions upon grants of irrigation rights of way, it is clear that no provision in the 1891 or 1901 Acts precludes the Secretary from implementing NEPA's environmental mandate. As stated above, in exercising discretion to impose terms and conditions upon rights of way granted over federal lands, the Secretary must comply with NEPA's mandate to protect the environment. *See Detroit Edison Co.*, 630 F .2d at 450, 451.

The district court's grant of summary judgment is REVERSED.

United States Court of Appeals
for the Ninth Circuit

GRINDSTONE BUTTE PROJECT, et al.,

Appellees,

v.

THOMAS S. KLEPPE, Secretary of the Interior, et. al.,

Appellants.

No. 78-1134

ORDER

Before: SKELTON, Judge,* FARRIS and PREGERSON, Circuit Judges

Appellee's motion to recall the mandate, and to withdraw a portion of the opinion and judgment, and to affirm the decision of the district court IS DENIED.

---

* Hon. Byron G. Skelton, Senior Judge, United States Court of Claims, sitting by designation.

In the United States District Court
for the District of Idaho

GRINDSTONE BUTTE PROJECT,
a tenancy in common, et al.,

Plaintiffs,

v.

THOMAS S. KLEPPE, Secretary
of the Interior, et. al.,

Defendants.

Civ. No. 1-76-173

MEMORANDUM OF OPINION
AND ORDER

This matter is presently before the court on the motion of plaintiffs for a summary judgment. This motion presents the principal question of whether the Secretary of the Interior may lawfully impose conditions upon rights-of-way granted under and pursuant to 43 U.S.C. §§ 946-949, also referred to as the 1891 Act.

There is no claim by any of the parties that genuine issues of material facts exist, and the record does not disclose that there are any such issues.

The admitted facts in the record indicate that plaintiffs are the owners of certain rights-of-way for

irrigation purposes across federal public land in Elmore County, Idaho. These rights-of-way exist by virtue of two grants made to the plaintiffs under and pursuant to Sections 18-21 of the Act of March 3, 1891 (26 Stat. 1001) as amended, 43 U.S.C. §§ 946-949. Grant No. I-7365 was made May 16, 1974, and Grant No. I-7366 was made April 23, 1974. The two "decisions" of the Idaho State Office of the Bureau of Land Management (BLM), Department of the Interior, which describe the grants, each contain four "Terms and Conditions of Grant". Plaintiffs objected to two of the stated terms and conditions that imposed certain additional obligations and responsibililties upon the construction and operation of plaintiffs' irrigation system. Plaintiffs twice appealed to the Interior Board of Land Appeals from both decisions in an effort to have these terms and conditions set aside. The Interior Board of Land Appeals affirmed the Idaho State Office of the BLM on both appeals, first upholding the authority of the Secretary of Interior (Secretary) to condition the grants and, second, upholding the particular conditions and stipulations imposed. Having exhausted their administrative remedies, plaintiffs filed this action September 1, 1976, seeking declaratory judgment that the Secretary and the other defendants have no lawful authority to impose the conditions and stipulations stated in the grant decisions of the Interior Board of Land Appeals, expungement of the terms and conditions from the grant decisions and land records; an order requiring the defendants to dismiss a pending administrative contest against

one of the rights-of-way; and an injunction precluding defendants from future administrative contests involving these rights-of-way.

Plaintiffs filed their motion for summary judgment on April 18, 1977, and oral argument was heard June 8, 1977. Plaintiff's position is that a right-of-way grant for irrigation purposes under the 1891 Act is a grant *in praesenti* by Congress and therefore the Secretary may not impose conditions beyond those stated in the Act. Plaintiffs apparently do not claim that they should not comply with other applicable valid statutes and regulations in regard to the construction and operation of the irrigation system.

The defendants rely generally upon the authorities and reasoning contained in Memorandum #M-36500 from Associate Solicitor Soller, Division of Public Lands, to the Director, Bureau of Land Management, dated May 5, 1958. This Memorandum concludes that the Secretary does have the authority to condition a grant made under the 1891 Act.

A considerable portion of the briefs and oral argument has been directed to the question of whether a right-of-way granted under the 1891 Act is a "limited fee" interest (being a fee with a possible reversion) or an easement as contended by the defendants. Although an easement is the interest more consistent with the language of the Act, resolution of this issue is not necessary for determination of whether the Secretary has authority to impose conditions upon these grants.

It is clear from the statute, as well as from the cases under it, that the 1891 Act is a grant *in praesenti.* 43 U.S.C. § 946 states in pertinent part:

> "The right of way through the public lands and reservations of the United States *is hereby granted* to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; . . ." (emphasis added)

The explanation of the 1891 Act in *Kern River Co. v. United States,* 257 U.S. 147, 42 S.Ct. 60, 66 L.Ed 175 (1921) reaffirms the contention that a present grant was intended by Congress. The grant becomes effective and title vests in the grantee upon approval of a map of the ditch, canal or reservoir by the Secretary. Moreover, when the 1891 Act was repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.,* the House Report at 90 Stat. 6636 recognized that the 1891 Act made an *in praesenti* grant of a right-of-way for the purposes therein specified.

Since a right-of-way grant under the 1891 Act is a present grant by Congress, the discretionary function of the Secretary in administering such a grant

is necessarily limited by the Act. Thus, the situation here is to be distinguished from cases in which the Secretary is given discretion under the applicable statute "to grant" rights-of-way in the first instance. *See Utah Power & Light Co. v. Morton*, 504 F.2d 725 (9 Cir. 1974); *Cf. Payne v. New Mexico*, 255 U.S. 367, 370-372, 41 S.Ct. 333, 65 L.Ed 680 (1921).

It is well settled that the power to administer a federal statute by prescribing regulations is limited by the scope of that statute. *E.g. Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936). Therefore, the specific question for purposes of this motion is whether the Secretary has authority under the 1891 Act or some other statute to issue regulations conditioning the grant of rights-of-way under that Act.

There is no language in the 1891 Act specifically granting the Secretary the power to attach additional terms and conditions to a primary right-of-way grant; discretion is given only as to "such additional right of way" as the Secretary may deem necessary. The Act itself places restrictions and conditions upon the grant. A map of the canal, ditch or reservoir must be filed with the officer designated by the Secretary of the Interior within a certain time. 43 U.S.C. § 947. There are restrictions in 43 U.S.C. § 946 on locating rights-of-way on government reservations. State control of water rights is also recognized in § 946, and from the language there it has been held that the right to obtain water is itself a requirement in order to prevent the grant

from being rendered futile. *United States ex. rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228 (D.C. Cir. 1936).

Under the statutory language of the 1891 Act, as amended, two conditions are apparent which must be satisfied to prevent a forfeiture of the right-of-way: each section of the proposed canal or ditch must be completed within five years after the "location" of that section, and the main purpose of the right-of-way must be for irrigation or drainage, although subsidiary uses are allowed such as for public, domestic, transportation or power purposes. 43 U.S.C. §§ 948, 951.

The present record in this cause does not indicate that there is any dispute as to any of the conditions specified in the granting act. However, the two decisions of the BLM detailing the grants in question state that the regulations in 43 C.F.R. Parts 2800 and 2870 apply. Part 2870 includes Subpart 2871 which deals with irrigation rights-of-way. In specifying the authority for Subpart 2871, § 2871.0-3 states:

> "(a)(1) Act of March 3, 1891, as amended. Section 18 of the act of March 3, 1891 (26 Stat. 1101), as amended ... authorizes the Secretary *to grant* rights-of-way for irrigation and drainage purposes over public lands and reservations to the extent of the ground occupied by the water of any reservoirs and any canals and laterals and 50 feet on each side of the marginal limits thereof and such additional right-of-way as may be deemed

> necessary for the proper operation and maintenance of said reservoirs, canals, and laterals." (emphasis added)

The language of this regulation implies that the Secretary has discretion to grant or not grant the primary right-of-way as well as any "additional" rights-of-way. In the opinion of this Court, this is an obvious misinterpretation of the 1891 Act since 43 U.S.C. § 946 itself specifically grants the primary right-of-way. To this extent, the cited regulation is an overstatement of the Secretary's authority.

The Solicitor's Memorandum #M-36500 relied upon by the defendants is based, at least in part, upon the misinterpretation just noted. *See* page 3 of the Memorandum. The Memorandum concludes:

> "... There would appear to be no reason why the Department (of the Interior) under its general administrative responsibilities for the management of the publilc lands, may not set out precisely the limits of the grant approved by the Department in accordance with the requirements and within the scope of the Act. Mandamus has been denied where the Secretary has refused to grant a right-of-way under the 1891 Act because of failure to meet the requirements imposed by his regulations. *United States v. Ickes*, 84 F.(2d) 228 (1936). The courts have upheld stipulations required by the Department conditioning grants of rights-of-way under the 1891 Act. *Verde River Irrigation & Power District v. Work.* 24 F.(2d) 886 (1928), cert. den. 279 U.S. 854 (1929). A right-of-way issued under the 1891 Act does not empower each holder

of such a right-of-way to exclude the public from fishing. See *United States v. Big Horn Land & Cattle Co.*, 17 F. (2d) 357 (1927). It is clear, therefore, that the Department may condition its approval upon the applicant's undertaking by stipulation to limit his use so as to permit public access for recreational and wildlife purposes, at least if such condition, as a matter of the factual circumstances involved, would not impair substantially the full enjoyment of the grant contemplated by the 1891 Act., *supra.*"

The *Ickes, Verde River Irrigation and Big Horn Land & Cattle* case cited in the Solicitor's Memorandum are each distinguishable from the present situation. Furthermore, the *Verde River Irrigation* case did not, as the Memorandum suggests, uphold stipulations required by the Interior Department solely on the basis of the 1891 Act. The stipulations there were imposed under a contract executed pursuant to 43 U.S.C. § 524. 24 F.2d at 889; *See Verde River Irrigation & Power District v. Salt River Valley Water Users' Assn.*, 94 F.2d 936, 938 (9 Cir. 1938) (subsequent case involving the same right-of-way). Therefore, in addition to the fact that the Solicitor's Memorandum lacks the force and effect of law, his conclusion is not based upon authority persuasive on the issue presented here.

43 C.F.R. Subpart 2800 (1975) sets out the specific statutory authority for promulgation of the general right-of-way regulations. Those authorities include 5 U.S.C. § 301 and 43 U.S.C. §§ 2 and 1201. In the

case of *United States v. George*, 228 U.S. 14, S.Ct. 412, 57 L.Ed 712 (1913), these same authorities (which were then designated as Sections 161, 453 and 2478 of the Revised Statutes) were claimed to give the Secretary sufficient authority to issue a regulation requiring a claimant for a land patent to take a certain oath for proof of entry. This regulation was in addition to the statutory requirement which, by its terms, required only the testimony of two persons other than the claimant. The Supreme Court, affirming the trial court, held that the cited statutes conferred upon the Secretary "administrative power only" and did not grant authority to add conditions not required by the land patent statute. This decision was based upon the rationale that the power to add requirements to the statute was legislative and not administrative in nature, and that legislation cannot be exercised by the Secretary under the guise of regulations. *See* 228 U.S. at 20, 21.

If the Secretary in *United States v. George, supra* had no authority to require acts of a claimant in addition to those stated in the patent statute, it can be reasonably concluded that no such authority exists in the case of a statute granting a right-of-way.

There may be some merit to the argument that since the government has a continuing interest in the land and its use when it grants only a right-of-way, the Secretary should be allowed to condition the right-of-way as he deems proper. Here, however, the rights-of-way were granted by a Congressional Act., without giving the Secretary any broad discre-

tion to award, withhold or condition the grants. Congress spelled out specifically the conditions to be satisfied in order to gain the benefits of a grant. If additional requirements could be imposed by the Secretary as conditions upon the grants, then there arises the possibility of a forfeiture of the grants for failure to satisfy a condition not specified or intended by Congress. Since Congress specifically conditioned a grant under the 1891 Act, the Secretary should not be permitted to, in effect, legislate substantial additional conditions. Therefore, the terms and conditions set forth in the grants to the plaintiffs, which are not specifically required by 43 U.S.C. §§ 946-949, are of no effect since such terms and conditions are being imposed beyond the authority of the Secretary and Department of the Interior.

Plaintiffs seek to have this Court order the defendants to dismiss the administrative contest filed against right-of-way grant #I-7365, which raises the question of whether the grant in issue can be forfeited or cancelled by administrative action.[1]

There is substantial authority to the effect that once a right to property conferred under a present grant by Congress has vested in the grantee, the grantee cannot be deprived of that right by an ad-

---

[1] If the administrative contest in this instance is based upon an alleged violation of a term or condition determined to be invalid as beyond the Secretary's authority, there would seem to be no practical need to reach this question. The present record in this Court, however, is not clear as to the specific ground or grounds upon which the administrative action is based.

ministrative proceeding. *E.g., Noble v. Union River Logging R. Co.*, 147 U.S. 165, 13 S.Ct. 271, 37 L.Ed 123 (1893); *Kern River Co. v. United States, supra.* This rule was applied specifically to 1891 Act rights-of-way in *Kern River Co., supra.* By the admitted facts in this case, the Secretary approved plaintiffs' maps as provided in 43 U.S.C. § 947. Thus, the title to the rights-of-way having vested in plaintiffs cannot be cancelled or forfeited by the administrative action taken by defendants.[2]/

Accordingly, it is ORDERED that the motion of the plaintiffs for summary judgment be, and the same hereby is, GRANTED, consistent with the above and foregoing. Plaintiffs' counsel may prepare and submit a proper judgment, serve a copy of the same on counsel for the defendants and submit the original to this Court.

Dated this 9th day of August, 1977.

FRED M. TAYLOR
United States District Judge

---

[2] 43 C.F.R. § 2802.3-1 (1075) states that all rights-of-way "approved pursuant to this part . . . shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way . . ." From the authorities cited above, it is clear that this regulation cannot be applied to a grant under the 1891 Act.

In the United States District Court
for the District of Idaho

GRINDSTONE BUTTE PROJECT,
a tenancy in common, et al.,

Plaintiffs,

v.

THOMAS S. KLEPPE, Secretary
of the Interior, et. al.,

Defendants.

Civ. No. 1-76-173

JUDGMENT

A motion by the Plaintiffs for summary judgment having been duly brought on to be heard, and the Court having made a memorandum of Opinion and Order pursuant thereto granting the Plaintiffs' motion and directing that judgment be entered herein in the Plaintiffs' favor, it is hereby

ORDERED, ADJUDGED AND DECREED that title to the rights of way identified by Serial Nos. I-7365 and I-7366 vested in the Plaintiffs upon the Secretary of the Interior's approval of the Plaintiffs maps, such approval having been made on May 16,

1974, with respect to Right of Way No. I-7365, and on April 23, 1974, with respect to Right of Way No. I-7366 and such vested title cannot be cancelled or forfeited by an administrative proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms and conditions set forth in the Right of Way Decisions issued to the Plaintiffs, except Term and Condition No. 1 in each Right of Way, and the stipulations in Exhibit A of each Right of Way Decision, except Stipulation No. 11 in Exhibit A of Right of Way No. I-7365 (pertaining to Powersite Classification #435), are not specifically required by 43 U.S.C. §§ 946-949 and are of no effect since such terms and conditions are being imposed beyond the authority of the Secretary and Department of the Interior, and the Plaintiffs' Rights of Way Nos. I-7365 and I-7366 are subject only to all valid rights existing on the dates of the grants, as provided in Term and Condition No. 1, and to Stipulation No. 11 in Exhibit A in Right of Way No. I-7365, and to such other terms and conditions as are specifically required by 43 U.S.C. §§ 946-949.

Dated September 8, 1977.

FRED. M. TAYLOR
United States District Judge

GRINDSTONE BUTTE PROJECT

IBLA 74-313
Decided November 7, 1974

OPINION
BY ADMINISTRATIVE JUDGE RITVO

The Grindstone Butte Project, a tenancy in common organized for the purpose of delivering water to a number of desert land entries, has appealed from two decisions by the Idaho State Office, Bureau of Land Management, dated May 16, 1974 (I-7365), and April 23, 1974 (I-7366), granting rights-of-way pursuant to the Act of March 3, 1891, 26 Stat. 1101, *as amended*, 43 U.S.C. §§ 946 *et seq.* (1970). Appellant objects to the fact that the rights-of-way were granted subject to certain stipulations. See Appendices A and B.

Application I-7365 is for an irrigation pipeline and pump base right-of-way. Its purpose is for the expansion of an existing pumpsite and penstock granted under right-of-way I-6530. The pump base will be situated on the Snake River, near Glenns Ferry, Idaho, and will occupy a surface area of 20,000 square feet. The site will consist of high lift pumps mounted on a concrete base. Water will be lifted about 400 feet through a 48-inch pipeline and will then spill into an earthen canal. The pipeline right-of-way will be 50 feet wide and run through 3,856 feet of public land. Part of this area is includ-

ed within Power Site Classification No 435, dated August 16, 1955.

Application I-7366 is for irrigation pipelines and a canal right-of-way. The canal will be 100 feet wide and 6 feet deep and is an extension of an existing canal constructed by appellant under right-of-way I-6530. The canal will cross 6 miles of public land and will have a road constucted on its bank. Lateral buried pipelines will extend from the canal to service desert land entries. The several pipelines will cross a total of 18.7 miles, 16.7 of which cover allowed desert land entries.

The applications were filed on October 23, 1973 (I-7365), and December 17, 1973 (I-7366). In both applications appellant agreed that if the rights-of-way were approved, they would be subject to the terms and conditions of the applicable regulations in 43 CFR 2800.[1] Following receipt of the applications, the Bureau of Land Management's staff prepared field reports and environmental analyses for the areas affected by the rights-of-way. In addition to the reports developed by the Bureau's staff of real-

---

[1] 43 CFR 2801.1-5(h) reads as follows:

"An applicant, by accepting a right-of-way, agrees and consents to comply with and be bound by the following terms and conditions . . .:

(h) To comply with such other specified conditions, within the scope of the applicable statute and lawful regulations thereunder, with respect to the occupancy and use of the lands as may be found by the agency having supervision of the lands to be necessary as a condition to the approval of the right-of-way in order to render its use compatible with the public interest."

ty, resource, wildlife, recreation and conservation specialists, further information was obtained from the Bureau of Sport Fisheries and Wildlife, the conservation Division of the U.S. Geological Survey, the Idaho Department of Fish and Game, the Saylor Creek Planning Unit for Intensive Agriculture Development, and the Federal Power Commission. Based upon a review of all the relevant information, the Bureau staff recommended that the rights-of-way be approved subject to conditions for the protection of hydroelectric, environmental and other interests of the public. Thereafter, the Idaho State Office issued its decisions granting the rights-of-way to appellant subject to the stipulations listed in Appendices A and B, respectively.

On appeal, the Grindstone Butte Project objects to those portions of the BLM decisions which impose upon the right-of-way grants the terms and conditions contained in the stipulations. Appellant asserts three major points in its brief as a basis for having these stipulations declared invalid and removed from the grants. First, appellant maintains that rights-of-way under the Act of March 3, 1891, are legislative grants *in praesenti* with title vesting in the grantee upon approval of the maps of the Secretary of the Interior. Appellant argues that if the map is in proper form and the land is public land, the Secretary *must* give his approval. Second, appellant argues that assuming approval by the Secretary is discretionary, he has no authority to impose upon right-of-way grants conditions, such as those at issue, which are not specifically authorized

or required by the Act. Finally, appellant argues that the conditions being imposed are unreasonable as they prevent appellant from having exclusive use and control of the land surface, and are burdensome, thus substantially impairing the full enjoyment of the rights-of-way. Appellant requests a hearing on the issue of the reasonableness of the stipulations.

Appellant's initial argument was disposed of in a recent case before the Board. *Zelph S. Calder,* 16 IBLA 27, 33, 81 I.D. 339, 342 (1974). In the *Calder* case, the appellant also argued that under the 1891 Act rights vested upon the filing of a proper map. In response we stated the following:

> (T)he right-of-way does not vest until all requirements have been met and the Secretary of the Interior has approved the application. The Secretary's approval is a prerequisite to the vesting of the grant of a right-of-way under the 1891 Act. *United States ex. rel. Sierra Land & Water Co. vs. Ickes,* 84 F.2d 228, 231 (D.C. Cir.), *cert. denied,* 229 U.S. 562 (1936); *United States v. Rickey Land & Cattle Co.,* 164 F. 496, 500 (C.C.N.D. Cal. 1908); *Rimrock Canal Co.,* 9 IBLA 333, 343, 80 I.D. 197, 200 (1973).[2]

In the *Ickes* case, the court upheld the Secretary's refusal to approve a right-of-way under the Act of March 3, 1891, for a ditch and reservoir system. The court denied that there was an absolute right to the grant stating:

---

[2] *See also James D. Perkins,* 13 IBLA 74, 76 (1973).

> The contention that the grant is one *in praesenti*, and therefore vests title in the applicant, irrespective of the approval by the Secretary of the Interior, cannot be sustained. So long as the exercise of the power of approval by the Secretary is not unreasonable, or contrary to statutory mandates governing the allowance of rights of way for canals and reservoirs, the jurisdiction of the Secretary to act under reasonable regulations respecting such grants cannot be controlled by the mandatory orders of the courts.

84 F.2d at 231. Accordingly, we find that appellant's first argument is without merit.

Appellant's second argument must also be rejected. In *Calder, supra*, we not only held that Secretarial approval was discretionary, but, in addition, stated that the Secretary could "condition the grant to ensure that the public interest will be protected. *Solicitor's Opinion*, M-36500 (May 5, 1958)." The issue in *Solicitor's Opinion*, M-36500, was whether the Bureau of Land Management could require an applicant for a right-of-way under the 1891 Act to enter into stipulations assuring the public of access for wildlife and recreation purposes. The Solicitor concluded that the right-of-way under the Act was in the nature of an easement which the Secretary could grant in his discretion and which could be qualified by conditions deemed by the Secretary to be in the public interest. *Cf. Great Northern Ry. Co. v. United States*, 315 U.S. 262, 271 (1942).

Appellant suggests that we reject the reasoning of the Solicitor as it was not developed in an adversary proceeding and has no support in the case law. We decline such a suggestion. The Solicitor's reasoning is sound. In view of the fact that we have held that the Secretary may *reject* a right-of-way application which would adversely affect the public interest, it is no less reasonable to hold that the Secretary may *qualify* his approval by requiring that the grantee stipulate to conditions for protection of the public interest. Furthermore, this reasoning is supported by case law. In *Verde River Irrigation & Power District v. Work*, 24 F.2d 886 (D.C. Cir. 1928), *cert. denied*, 279 U.S. 854 (1929), plaintiff filed an application for a right-of-way pursuant to the Act of March 3, 1891. The application was opposed by another irrigation association. Both parties sought damsites for the storage of water. Following discussions between the two parties and the Department, contracts were executed by the Secretary of the Interior with both parties, pursuant to the Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. §§ 523 *et seq.*,[3] to provide for cooperative construction and use of reservoirs, canals and ditches subject to stipulations set forth therein. Following execution of the contracts, plaintiff again filed an application for a right-of-way under the 1891 Act. The court stated that it was permissible for the Secretary to approve the ap-

---

[3] The Act authorizes the Secretary of the Interior, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water for irrigation use.

plication, 24 F.2d at 888. Thus, the court approved the Secretary's authority to condition the grant of a right-of-way under the 1891 Act upon acceptance by the grantee of stipulations for the benefit of the public interest. *See also Solicitor's Opinion*, 60 I.D. 477, 478-79 (1951).

In its final argument on appeal, appellant urges that the stipulations are unreasonable as they prevent appellant from having exclusive use and control of the right-of-way areas, and are burdensome, thus substantially impairing enjoyment of the grants. The grant of a right-of-way under the 1891 Act does not include exclusive possession and control of the area. In *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357, 366 (8th Cir. 1927), the court held that a right granted under the 1891 Act, which included use of a natural lake as a reservoir, did not carry with it exclusive fishing rights in the lake. The right was held subject to access and privileges by United States citizens. *See Zelph S. Calder, supra* at 38, 81 I.D. at 345. In the present case, the Bureau of Land Management, for the protection of the public, deemed it necessry to condition appellant's right-of-way grants with stipulations concerning the use of poisonous substances, reseeding of disturbed lands, removal of refuse, prevention of water pollution, protection of fish, protection of archeological sites, assurances of livestock mobility, and protection for hydroelectric development. Appellant argues that these stipulations are unreasonably burdensome and requests a hearing to develop evidence on the issue. In its appeal brief, ap-

pellant has not demonstrated that the stipulations are either inconsistent with or tend to unreasonably encumber the proposed projects. Furthermore, a hearing in this instance is a matter of discretion with the Board. 43 CFR 4.415. While we do not believe that a hearing is justified in this matter, further clarification regarding the compatibility of the stipulations with the proposed projects seems warranted. As was pointed out in *Solicitor's Opinion*, M-36500, *supra* at 4, while the Department can condition right-of-way grants under the 1891 Act, such conditions must not, as a matter of the factual circumstances involved, unreasonably impair the full enjoyment of the grant. Accordingly, appellant will be given the opportunity to present objections to the State Office regarding the alleged unreasonableness of the stipulations. Objections must be presented within 30 days following receipt of this decision. Thereafter, the State Office will issue a decision on the matter subject to appellant's right to appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are remanded to the State Office for action consistent with the view expressed herein.

Martin Ritvo
Administrative Judge

We conccur:
Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

APPENDIX A

STIPULATIONS
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY I-7365

1. The permittee agrees in all operations under this permit to comply with the applicable State and Federal laws and regulations concerning the use of poisonous substances, including insecticides, herbicides, fungicides, rodenticides and other similar substances. Prior to the use of such substances on or near the right-of-way, the permittee shall obtain from the District Manager approval of a written plan for such use. The plan shall state the type and quantity of material to be used, the pest to be controlled, the method of application and such other information as he may require. All use of such substances on or near the right-of-way shall be in accordance with the approved plan. If the use of a poison is prohibited by the Secretary of the Interior, it shall not be used. If use of a poison is limited by the Secretary of the Interior, it shall be used only in accordance with that limitation.
2. Permittee shall survey and clearly mark the exterior limits of the right-of-way. All activities directly or indirectly associated with the construction or maintenance of the pump site and pipeline must be conducted within the limits of the right-of-way.
3. All disturbed areas shall be reseeded to mixed

grasses, in the manner directed by the District Manager.

4. The pipeline construction will be done in such a manner as to cause the least disturbance from the pumpsite to the top of the canyon rim.
5. The pumpsite will be kept clean at all times, either on or off the right-of-way grant where equipment has been operated or repaired, remove all garbage, remove all temporary structures, packing cases, trash, litter, fuel containers, oil cans, wire, discarded equipment or parts thereof, or other refuse resulting from construction or operations, and will be so maintained so as not to detract from the area.
6. No chemical treatment of the channel or bay for removal of vegetation will be allowed. The pumping installation will not be a source of water pollution from oil, paint, detergents, chemicals, etc. If such pollution occurs, it shall be stopped and cleaned up by the grantee.
7. The grantee will be responsible for all damages from construction, use and maintenance for all facilities, and from leakage or flow from the pipeline. Any damages from the above will be immediately corrected.
8. Screens or other measures shall be placed around the pumps to prevent small fish from entering.
9. The United States Government and State Government agencies are not responsible for any harm or actions of the grantees, their contractor, sub-contractor, or persons using the area.

10. A performance and payment of bond of $5,000 for the grantee will be posted and said bond maintained until proof of construction and compliance inspection by the agencies has been satisfied. This bond must be submitted to the Bureau within 30 days of the date of grant.
11. In the event the land withdrawn in Powersite Classificiation #435 is required for hydroelectric development purposes, any structures or improvements placed thereon found to interfere with such development shall be removed or relocated as necessary to eliminate such interference, at no cost to the United States, its permittees or licensees.
12. Any violation of these stipulations will result in cancellation of the right-of-way grant and forfeiture of the performance and payment bond.
13. Permittee shall notify the Department of Anthropology, Idaho State University, Pocatello, of proposed construction under this application in order that the University may negotiate with the permittee for the purpose of undertaking, prior to construction of the project, an archaeological survey and salvage excavation to be financed by the permittee.

    Should additional sites, ruins, or artifacts be discovered during construction activities, construction will immediately be suspended and the BLM District Manager shall be notified. If the District Manager finds the damage or destruction to historic or prehistoric remains or artifacts

cannot be avoided as a result of planned construction activities, the permittee will be required to provide at his expense, proper scientific investigation. All investigation and salvage will be covered by an Antiquities Act Permit applied for by the agency doing the survey or salvage work.

APPENDIX B

STIPULATIONS
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY I-7366

1. The permittee agrees in all operations under this permit to comply with the applicable State and Federal laws and regulations concerning the use of poisonous substances, including insecticides, herbicides, fungicides, rodenticides and other similar substances. Prior to the use of such substances on or near the right-of-way, the permittee shall obtain from the District Manager, approval of a written plan for such use. The plan shall state the type and quantity of material to be used, the pest to be controlled, the method of application and such other information as he may require. All use of such substances on or near the right-of-way shall be in accordance with the approved plan. If the use of a poison is prohibited by the Secretary of the Interior, it shall not be used. If use of a poison is limited by the Secretary of the Interior, it shall be used only in accordance with that limitation.

2. Permittee shall survey and clearly mark the exterior limits of the right-of-way. All activities directly or indirectly associated with the construction or maintenance of the irrigation facilities must be conducted within the limits of the right-of-way. Exterior boundaries will be identified by a one foot wooden stake every 200 feet.

3. All disturbed areas along the canal banks (as it crosses both private and national resource land) and the pipeline (as it crosses national resource land) will be seeded to a mixture of Acer Milkvetch, Ladak alfalfa, Eski Sainfoin, crested wheatgrass, and Russian wildrye at a rate of 15 lbs. per acre (3 lbs. per acre per species). Also, a portion of the canal bank, as chosen by an authorized Bureau of Land Management officer, will be planted with 300 shrub seedlings. The seed and seedlings will be supplied by the Bureau of Land Management. The seed application shall be done by broadcast, with a mechanical seeder. Seeding and planting shall be done in the fall by the grantee and will begin within one week after notice by the Bureau of Land Management.
4. The vegetation along the canal bank and pipeline shall not be chemically treated or burned, but will be maintained by mowing when necessary as determined by an authorized Bureau of Land Management officer. Such maintenance is the responsibility of the grantee.
5. If the construction uncovers any archaeological sites, the construction will stop and the Bureau of Land Management will be notified.
6. In the event future livestock management dictates livestock movement across the canal, the grantee will be responsible for providing a means for the livestock to safely cross the canal.

GRINDSTONE BUTTE PROJECT
IBLA 76-166

Decided February 23, 1976

Appeal from decision of the Idaho State Office, Bureau of land Management, dismissing objections to stipulations imposed as a condition for acceptance of right-of-way applications I-7365 and I-7366.

OPINION
BY ADMINISTRATIVE JUDGE RITVO

This case was previously treated by the Board in an earlier decision, *Grindstone Butte Project,* 18 IBLA 16 (1974), where we held, in part, that the Secretary of the Interior could condition the grant of a right-of-way under the Act of March 3, 1891, 26 Stat. 1101, *as amended,* 43 U.S.C. § 946 *et seq.* (1970), with reasonable stipulations designed to protect the public interest. An adequate statement of the factual background of the case, and appendices listing the stipulations imposed by the Bureau of Land Management (BLM), are set out in our earlier decision.

In the previous appeal, appellant not only argued that the Secretary had no authority to impose conditions upon right-of-way easements, but also urged that the particular stipulations being imposed were unreasonably burdensome and requested a hearing on the issue of their reasonableness. After rejecting the former argument and the request for a hearing, the Board remanded the case to give appellant an

opportunity to present written objections to the State Office regarding the alleged unreasonableness of the stipulations.

On December 9, 1974, appellant filed its objections to the stipulations with the BLM. Thereafter, on August 5, 1975, the Idaho State Office, BLM, issued a decision dismissing all of appellant's objections with the exception of an objection to stipulation #6 under right-of-way I-7366, in which instance the BLM consented to modify the stipulation.[1] The Board finds itself in agreement with the BLM decision, a copy of which is attached hereto. See Appendix. In response to additional issues raised by the appeal, the following is added.

In its statement of reasons on appeal, which adopts the objections to the stipulations filed with the BLM, appellant has not limited itself to points concerning the BLM's bases for dismissing appellant's objections. Appellant also reargues the issues adjudicated in our previous decision and requests that the Board reconsider its prior determinations. Appellant has not provided the Board with a sufficient basis for granting reconsideration and, therefore, the request is denied. 43 CFR 4.21(c).

In its statement of reasons, appellant maintains that any requirements not authorized by the 1891 Act are "unreasonable per se," and that:

---

[1] Stipulation #6 for application I-7366 required that appellant provide a means for livestock to cross the canal. The BLM has agreed to modify the stipulation by adding the clause, "where no other means of livestock crossing exists."

> (T)he statute grants the right of way in plain and simple terms without imposing any of the limitations which the BLM sets forth in its stipulations. Congress expressed its determination in the 1891 Act that the granting of rights of way for irrigation purposes was in the public interest and the Department of the Interior has no authority to negate or detract from that congressional determination by the imposition of requirements and limitations on the right of way grant and restrictions upon the use of the right of way.

The problem with appellant's argument is that it misconceives the role the Department must pursue with respect to administering the laws relating to the management of national resource lands. While, admittedly, the issuance of right-of-way easements for irrigation purposes is, at times, in the public interest, this activity cannot be viewed in isolation from other expressions by Congress of what is deemed beneficial for the nation. There are other aspects to the public interest which this Department has a duty to protect and foster, and the 1891 Act cannot be administered without regard to these other responsibilities.

The Secretary of the Interior has directed the BLM to manage national resource lands in a way which will:

> . . . attain the widest range of beneficial uses of the environment (including the land, water, flora, fauna, and other environmental elements), without undue environmental degradation, risk to health or safety, or other undesirable consequences.

43 CFR 1725.3-2(a). The regulations in 43 CFR Subpart 2800, promulgated pursuant to the right-of-way provisions of the law, represent the Department's efforts to balance the interests of right-of-way applicants with other beneficial interests requiring consideration by the Department.

In the present case, the stipulations required by the BLM concern construction and maintenance requirements, monitoring the use of poisonous substances, reseeding of disturbed lands, removal of refuse, prevention of water pollution, protection of fish, protection of archeological sites, assurances of livestock mobililty, and protection of hydroelectric development. We find these interests to be of proper concern to this Department both directly and through the need to cooperate with other federal and state agencies.[2] Therefore, we reject appellant's arguments that the BLM is not empowered to require these stipulations as a condition precedent to the approval of the right-of-way applications.

---

[2] *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970); Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136, 136r(b) and (c) (Supp. III, 1973); Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251, 1314(j) (Supp. III, 1973); Fish and Wildlife Coordination Act of March 10, 1934, *as amended*, 16 U.S.C. § 661 *et seq.* (1970); Historic Sites Act of August 21, 1935, *as amended*, 16 U.S.C. §461 *et seq.* (1970); Taylor Grazing Act of 1934, *as amended*, 43 U.S.C. § 315 *et seq.* (1970); Federal Power Act of June 10, 1920, *as amended*, 16 U.S.C. §§ 791, 818 (1970); 43 CFR 2801.1-5(a); 43 CFR Part 24; 43 CFR Part 3; 43 CFR Part 4110; 43 CFR Part 2340.

As for appellant's specific arguments respecting each individual stipulation, we find that appellant has not demonstrated that the stipulations are either inconsistent with or tend to unreasonably encumber the proposed irrigation projects.[3] Therefore, we concur with the BLM's decision that the proposed stipulations are not unreasonably burdensome.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

---

[3] Appellant insists that stipulation #3 for application I-7366 is impermissible because it dictates requirements for portions of the irrigation facilities that are not located on national resource lands. This argument is also without merit. *Cf. Montana Power Co.*, 72 I.D. 518 (1965); Proposed Coal Mining Operating Regulations, 40 F.R. 41122, 41126 (1975) (proposed 43 CFR 3041.0-7).

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Idaho State Office
Room 398, Federal Building
550 W. Fort Street
P.O. Box 042
Boise, Idaho 83724

DECISION

RIGHT-OF-WAY GRANTED
Details of Grant

Serial number of grant: I-7365

Name of grantee: Grindstone Butte Project

Map showing the location and dimensions of grant:
Map designations: Pipeline and Pump Base Right-of-Way
Date filed: October 23, 1973

Permitted use by grantee: Pump base site and one-48" irrigation pipeline.

Authority for grant: Act of March 3, 1891 (26 Stat. 1101), as amended

Regulations applicable to grant:
Code reference: 43 CFR Parts 2800 and 2870

Date of grant: May 16, 1974

Expiration date of grant: 50 years

Rental: None
Amount:
When payable by grantee:

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order No. 701 of the Associate Director, Bureau of Land Management, dated July 23, 1964, (29 F.R. 10526), as amended, a right-of-way, the details of which are shown above, is hereby granted subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.
2. All regulations specified above.
3. Filing of proof of construction within 5 years of the date of grant.
4. Further terms and conditions as follows:
   (a) Pursuant to 43 CFR 2801.1-5, the District Manager, Boise District Office, 230 Collins Road, Boise, Idaho, has the authority to conduct all business with the grantee with respect to use of lands and disposition of resources, and the grantee is requested to contact him prior to the beginning of construction.
   (b) Stipulations of Exhibit A, attached hereto and made a part hereof.

Vincent S. Strobel, Chief
Branch of L & M Operations

(Note: Exhibit A contains the same stipulations as are stated in Appendix A of the IBLA's opinion of November 7, 1974, at 32a - 35a, supra.)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Idaho State Office
Room 398, Federal Building
550 W. Fort Street
P.O. Box 042
Boise, Idaho 83724

DECISION

RIGHT-OF-WAY GRANTED
Details of Grant

Serial number of grant: I-7366

Name of grantee: Grindstone Butte Project

Map showing the location and dimensions of grant:
Map designations: Canal and pipeline Right-of-Way
Date filed: December 17, 1973

Permitted use by grantee: Irrigation canal and pipeline

Authority for grant: Act of March 3, 1891 (26 Stat. 1101), as amended

Regulations applicable to grant:
Code refere. ce: 43 CFR Parts 2800 and 2870

Date of grant: April 23, 1974

Expiration date of grant: 50 years

Rental: None
Amount:
When payable by grantee:

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order No. 701 of the Associate Director, Bureau of Land Management, dated July 23, 1964, (29 F.R. 10526), as amended, a right-of-way, the details of which are shown above, is hereby granted subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.
2. All regulations specified above.
3. Filing of proof of construction within 5 years of the date of grant.
4. Further terms and conditions as follows:
   (a) Pursuant to 43 CFR 2801.1-5, the District Manager, Boise District Office, 230 Collins Road, Boise, Idaho, has the authority to conduct all business with the grantee with respect to use of lands and disposition of resources, and the grantee is requested to contact him prior to the beginning of construction.
   (b) Stipulations of Exhibit A, attached hereto and made a part hereof.

Vincent S. Strobel, Chief
Branch of L & M Operations

(Note: Exhibit A contains the same stipulations as are stated in Appendix B of the IBLA's opinion of November 7, 1974, at 36a - 37a, supra.)

Opposition

Office - Supreme Court, U.S.
FILED
OCT 2 1981
TEVAS.
CLERK

No. 81-236

In the Supreme Court of the United States

OCTOBER TERM, 1980

GRINDSTONE BUTTE PROJECT, ETC., ET AL.,
PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of the Interior was authorized to condition the grant to petitioners of irrigation rights of way over federal lands upon petitioners' compliance with reasonable regulations and terms designed to protect the public interest.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Andrus v. *Shell Oil Co.*, 446 U.S. 657 7

Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334 7

Burke v. *Southern Pacific R.R.*, 234 U.S. 669 7

Calvert Cliffs' Coordinating Committee, Inc. v. *United States Atomic Energy Commission*, 449 F. 2d 1109 8

Detroit Edison Co. v. *Nuclear Regulatory Commission*, 630 F. 2d 450 8

Gulf Oil Corp. v. *Morton*, 493 F. 2d 141 8

Hyrup v. *Kleppe*, 406 F. Supp. 214, aff'd, Nos. 76-1452, 76-1767 (10th Cir. Nov. 7, 1977) 7-8

Knight v. *United States Land Association*, 142 U.S. 161 ..... 4, 7

Public Service Co. of New Hampshire v. *United States Nuclear Regulatory Commission*, 582 F. 2d 77, cert. denied, 439 U.S. 1046 8

Page

Cases—Continued:

SEC v. *Chenery Corp.*, 318 U.S. 80 6

Union Oil Co. of California v. *Morton*, 512 F. 2d 743 8

United States v. *Price*, 361 U.S. 304 7

United States ex rel. Sierra Land & Water Co. v. *Ickes*, 84 F. 2d 228, cert. denied, 299 U.S. 562 ..... 5, 6, 7

Statutes and regulations:

Act of Mar. 3, 1891, ch. 561, Section 18, 26 Stat. 1101, 43 U.S.C. (1970 ed.) 946 2

Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. (1970 ed.) 959 3

Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 *et seq.* 8

Section 706(a), 90 Stat. 2793 ..... 2, 3

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 4, 5

43 C.F.R. Parts 2800 and 2870 (1973) 2

Miscellaneous:

3 *Powell on Real Property* (1952 ed.) 4

2 *Thompson on Real Property* (repl. ed. 1980) 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-236

GRINDSTONE BUTTE PROJECT, ETC., ET AL.,
PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 638 F. 2d 100. The opinion of the district court (Pet. App. 11a-21a) is not reported. The decisions of the Interior Board of Land Appeals (Pet. App. 24a-35a, 38a-42a) are reported at 18 I.B.L.A. 16 and 24 I.B.L.A. 49.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1981, and a petition for rehearing was denied on April 1, 1981. On June 18, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 6, 1981. The petition was filed on August 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1974, the Idaho Office of the Department of the Interior's Bureau of Land Management (BLM) granted two irrigation rights of way from Snake River over public lands in Elmore County, Idaho, to petitioner Grindstone Butte Project, a tenancy in common comprised of several individuals and two corporations. Grant No. I-7365 was for a pump base site and a 48-inch irrigation pipeline. Grant No. I-7366 was for an irrigation canal and pipeline. Both rights of way were limited to fifty years duration and granted under the authority of the Act of Mar. 3, 1891, ch. 561, Section 18, 26 Stat. 1101, 43 U.S.C. (1970 ed.) 946 (Pet. App. 2a).[1]

The grants include several terms and conditions issued pursuant to Department of the Interior regulations, 43 C.F.R. Parts 2800 and 2870 (1973). They require Grindstone, *inter alia*, to regulate the use of poisonous substances, to minimize despoliation of public land by reseeding soil that was disturbed by construction, to remove construction debris, to prevent the pollution of water by oil, paint, detergents, chemicals, etc., to place screens around the pumps to prevent fish from entering them, to preserve archeological sites discovered during construction and to provide a means for livestock to cross the canal safely (Pet. App. 32a-37a).

In 1974, Interior's Board of Land Appeals (IBLA) rejected petitioners' challenge to the Secretary's authority to impose terms and conditions upon rights of way granted under the 1891 Act (Pet. App. 27a-30a). IBLA, however, remanded the case to the Idaho Office of the BLM for consideration of Grindstone's objections to the reasonableness of the terms and conditions (*id.* at 30a-31a). On

---

[1]Subsequent to the filing of this action, the 1891 Act was repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793.

remand, the BLM dismissed all of petitioners' objections, except that it modified the stipulation requiring petitioners to provide a means for livestock to cross the canal by adding to it the clause " 'where no other means of livestock crossing exists' " (*id.* at 39a & n.1). In 1976, IBLA affirmed the BLM's determination that the contested terms and conditions were reasonable (*id.* at 38a-42a). The Board explained (*id.* at 40a) that the issuance of rights of way for irrigation purposes "cannot be viewed in isolation from other expressions by Congress of what is deemed beneficial for the nation." Referring to the National Environmental Policy Act of 1969 and other statutes (*id.* at 41a n.2), IBLA added (*id.* at 40a): "There are other aspects to the public interest which this Department has a duty to protect and foster, and the 1891 Act cannot be administered without regard to these other responsibilities."

Thereafter, petitioners filed this action in the United States District Court for the District of Idaho seeking, *inter alia*, a declaratory judgment that neither the Secretary of the Interior nor BLM officials possessed authority to impose conditions, other than those expressly specified in the 1891 Act, upon rights of way granted under that statute. The district court granted petitioners' motion for summary judgment on the ground that the Secretary lacked authority to impose terms and conditions upon rights of way granted under the 1891 Act (Pet. App. 11a-23a).

The court of appeals reversed (Pet. App. 1a-9a), holding (*id.* at 7a) that entitlement under the 1891 Act is qualified by the Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. (1970 ed.) 959, which explicitly authorized the Secretary to condition the grant of rights of way over federal lands upon "general regulations to be fixed by him."[2] In addition, the

---

[2]The 1901 Act, like the 1891 Act (see page 2 note 1, *supra*), was repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793.

court noted (Pet. App. 8a) that under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, "the Secretary of the Interior is not only permitted but required to take environmental values into account in carrying out regulatory functions * * *."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, because both the 1891 and the 1901 Acts have been repealed (see pages 2-3 notes 1 and 2, *supra*), this case has limited precedential significance. Further review by this Court is therefore not warranted.

1. At the outset, we note that the federal government has broad supervisory power over the public lands, which it holds in trust for the people of the United States (*Knight* v. *United States Land Association*, 142 U.S. 161, 181 (1891)):

> The Secretary [of the Interior] is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

Accordingly, the federal government has a substantial interest in requiring rights of way applicants to agree to minimize environmental disturbances, prevent pollution and, in general, to protect the public interest.[3]

---

[3]Moreover, petitioners, as owners of rights of way of 50 years duration only, do not have unencumbered title to the land, and the rights of way here are surrounded by public lands. At common law, the owner of the servient estate has always been entitled to require the owner of the dominant estate (*i.e.*, the easement holder) to exercise his power in a reasonable manner. See generally 3 *Powell on Real Property* 415 (1952 ed.); 2 *Thompson on Real Property* §§ 426, 427 (repl. ed. 1980).

2. Petitioners first contend (Pet. 15-18) that the court of appeals erred in upholding the Secretary's action on the basis of the 1901 Act because the Secretary invoked only the 1891 Act. Both of petitioners' assumptions are ill-founded, however: neither the Secretary's nor the court of appeals' decision was so narrowly based.

In upholding the terms and conditions imposed on the rights of way granted to petitioners, the Secretary (through IBLA) expressly rejected petitioners' narrow view of his power to protect the public interest, stating (Pet. App. 40a) that while

> the issuance of right-of-way easements for irrigation purposes is, at times, in the public interest, this activity cannot be viewed in isolation from other expressions by Congress of what is deemed beneficial for the nation. There are other aspects to the public interest which this Department has a duty to protect and foster, and the 1891 Act cannot be administered without regard to these other responsibilities.

The Secretary expressly noted (*id.* at 41a n.2) that his grants of rights of way under the 1891 Act are subject to other relevant legislation as well, for example, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

Nor did the court of appeals base its decision solely on the 1901 Act. While the court noted (Pet. App. 6a; emphasis added) that "the 1901 Act *explicitly* authorizes the Secretary of the Interior to grant and revoke rights-of-way pursuant to regulations adopted by the Department of the Interior," its reliance (*ibid.*) on *United States ex rel. Sierra Land & Water Co.* v. *Ickes*, 84 F. 2d 228 (D.C. Cir.), cert. denied, 299 U.S. 562 (1936), indicates that it found such authority *implicit* in the 1891 Act. In *Ickes*, the District of Columbia Circuit rejected the argument that the 1891 Act

was an *in praesenti* grant (84 F. 2d at 231) and refused to issue a writ of mandamus to compel the Secretary of the Interior to approve applications for rights of way free from nonstatutory conditions. In so doing, the court noted (*id.* at 230) "the broad jurisdiction conferred upon the Secretary of the Interior in respect of the disposition of the public lands of the United States * * *."

Moreover, the court below found no inconsistency between the 1891 and 1901 Acts, which would have required a determination whether the 1901 Act impliedly repealed the 1891 Act or any part of it (Pet. App. 6a-7a). Rather, the court of appeals held that the 1891 and the 1901 Acts *together* required its holding that entitlement to irrigation rights of way is conditioned upon compliance with reasonable regulations and terms designed to protect the public interest.

Finally, the court of appeals expressly approved (Pet. App. 8a-9a) the Secretary's additional reliance on NEPA as a ground for imposing restrictive terms and conditions on the right of way grants. The Secretary's failure expressly to mention the 1901 Act does not render his decision infirm under *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Contrary to petitioners' contention (Pet. 18), the court of appeals did not supply a new *post hoc* rationalization to support the Secretary's decision or substitute its judgment for that of the agency. Rather, throughout these administrative and judicial proceedings, the Secretary has maintained that he is authorized to impose reasonable conditions on right of way grantees; the court of appeals merely recognized explicitly the various sources of that authority.

3. In a more substantive vein, petitioners contend (Pet. 19-24) that the 1891 Act under which the rights of way were granted is an *in praesenti* grant and that the Secretary of the Interior therefore lacks authority to impose any conditions on them that are not explicitly set forth in the Act itself.

As the court of appeals recognized (Pet. App. 5a-6a), however, the 1891 Act itself implicitly authorizes the Secretary to impose reasonable conditions on the exercise of rights of way granted thereunder. See *United States ex rel. Sierra Land & Water Co.* v. *Ickes, supra*, and discussion of that case (pages 5-6, *supra*). The *Ickes* court correctly construed the 1891 Act in light of the broad power Congress has conferred upon the Secretary to administer and dispose of the public lands. *Ickes, supra*, 84 F. 2d at 230. See also *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 339 (1963); *Knight* v. *United States Land Association, supra*, 142 U.S. at 181.[4]

Even if the 1891 Act alone did not support the Secretary's authority to impose reasonable conditions on rights of way granted under that Act, Congress supplied such authority when it passed the 1901 Act. That statute expressly authorizes the Secretary to grant and revoke rights of way pursuant to regulations promulgated by him. Accordingly, the court of appeals properly held (Pet. App. 7a) that any entitlement an applicant had under the 1891 Act "was qualified by the 1901 Act authorizing the Secretary to condition the grant of rights of way over federal lands upon compliance with reasonable regulations and terms designed to protect the public interest." Cf. *Hyrup* v. *Kleppe*, 406 F. Supp. 214 (D. Colo. 1976), aff'd, Nos. 76-1452, 76-1767

---

[4]This Court recently noted (*Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980)) that "arguments predicated upon subsequent congressional actions must be weighed with extreme care * * *." In view of Congress' longstanding policy to accord to the Secretary of the Interior broad discretion over the administration and disposition of the public lands, the post-enactment legislative history relied on by petitioners (Pet. 20-21) provides a particularly "hazardous basis for inferring the intent of [the enacting Congress]." *United States* v. *Price*, 361 U.S. 304, 313 (1960).

Petitioners' reliance (Pet. 19) on *Burke* v. *Southern Pacific R.R.*, 234 U.S. 669 (1914), also is misplaced, since that case involved the wholly distinct subject of mineral lands.

(10th Cir. Nov. 7, 1977) (concluding that the Act of July 26, 1866, ch. 262, 14 Stat. 251, 43 U.S.C. 661, another irrigation right of way statute, which is similar to the 1891 Act, afforded a right to use public lands for the installation of a pipeline subject to regulations promulgated under the 1901 Act).

Moreover, Congress' enactment of NEPA "not only permit[s] but require[s the Secretary] to take environmental values into account in carrying out [his] regulatory functions" (Pet. App. 8a). Thus, as both the Secretary and the court of appeals recognized, the agency's responsibilities under the 1891 Act cannot properly be fulfilled in isolation from its other statutory obligations. See *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1112 (D.C. Cir. 1971) ("NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department"). See also *Detroit Edison Co.* v. *Nuclear Regulatory Commission*, 630 F. 2d 450, 451 (6th Cir. 1980); *Public Service Co. of New Hampshire* v. *United States Nuclear Regulatory Commission*, 582 F. 2d 77, 86 (1st Cir. 1978), cert. denied, 439 U.S. 1046 (1978) (emphasis in original) ("[t]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act *and* those of the National Environmental Policy Act"); *Union Oil Co. of California* v. *Morton*, 512 F. 2d 743, 749-750 (9th Cir. 1975); *Gulf Oil Corp.* v. *Morton*, 493 F. 2d 141, 145-146 (9th Cir. 1973).

4. At all events, as the court of appeals noted (Pet. App. 3a-4a n.2), the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*, which repealed the 1891 and 1901 Acts (see pages 2-3 notes 1 and 2, *supra*), specifically authorizes the imposition of the types of terms and conditions involved here. Accordingly, the question is settled for the future and the present decision governs rights of way granted under the 1891 Act prior to October 21, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
JACQUES B. GELIN
Attorneys

OCTOBER 1981

DOJ-1981-10